



Montana Legislative Services Division
Legal Services Office

PO BOX 201708
Helena, MT 59620-1708
(406) 444-3084
FAX (406) 444-3038

Keep - Tuition Condition
SENATE EDUCATION
EXHIBIT NO. _____
DATE 3-13-2009
BILL NO. HB 645

March 13, 2009

Representative Dan Villa
417 Main Street
Anaconda, Montana 59711

Dear Representative Villa:

I am writing in response to your request for an opinion as to whether the Legislature may condition the receipt of an appropriation upon the Board of Regents not increasing tuition for units of the Montana University System. The scope of the legislative appropriation power under the 1972 Montana Constitution was determined in 1975 in the companion cases of State ex rel. Judge v. Legislative Finance Committee, 168 Mont. 470, 543 P.2d 1317 (1975), and Board of Regents v. Judge, 168 Mont. 433, 543 P.2d 1323 (1975).

The Court in Board of Regents noted that the 1972 Montana Constitution had broadened the scope of the appropriation power. Previous court decisions had limited the scope of the appropriation power to the general fund. The Court cited Article VI, section 9, requiring the Governor to submit to the Legislature a budget "setting forth in detail for all operating funds the proposed expenditures and estimated revenue of the state", Article VIII, section 9, concerning a balanced budget, and Article VIII, section 12, requiring strict accountability of revenue and expenditures. The Court said:

Thus the legislative appropriation power now extends beyond the general fund and encompasses all those public operating funds of state government. Board of Regents, at 446.

In Board of Regents, it was determined that item appropriations in the General Appropriations Act are authorized. Legislative control of higher education through the appropriation process remains. The Regents are a constitutional body in Montana government subject to the power to appropriate and the public policy of this state. Board of Regents at 449. However, the Legislature cannot use appropriations to do indirectly what it is prohibited from doing directly. The Legislature may condition an appropriation, and the receiving entity may accept or reject the appropriation. If the entity accepts the appropriation, the conditions are binding on the entity. In the event of a challenge to a condition, the courts will scrutinize the conditions individually to determine their propriety. There is no distinct line for determining the validity of a condition attached to an appropriation. Line item appropriations become constitutionally impermissible when the authority of the Regents to supervise, coordinate, manage, and control the University System is infringed by legislative control over expenditures. Board of Regents at 450.

The Montana Supreme Court adopted the analysis of the Minnesota Supreme Court in State ex rel. University of Minnesota v. Chase, 175 Minn. 259, 220 N.W. 951, 955 (1928), concerning the propriety of legislative conditions to university system appropriations as follows:

... At the one extreme, the Legislature has no power to make effective, in the form of a law, a mere direction of academic policy or administration. *At the other extreme it has the undoubted right within reason to condition appropriations as it sees fit. "In such case the regents may accept or reject such appropriation. . . . If they accept, the conditions are binding upon them."* (emphasis in original) Board of Regents at 451.

The Montana Supreme Court quoted from Regents of University of Michigan v. State, 47 Mich. App. 23, 208 N.W.2d 871, 877 (1973), quoting from 55 Mich. L. Rev. 728, 729, with respect to the types of conditions that could be attached to appropriations. Board of Regents at 453. The Michigan case held that the power to establish tuition and student fees reposes exclusively in the governing boards of state universities and it is beyond the power of the Legislature to attempt to establish tuition rates by a statute that provided that the general appropriation will automatically be reduced by an amount equal to any monies received by the universities as a result of an increase in student fees or tuition, which would indirectly prevent the universities from increasing their tuition rates. Because Board of Regents relied so heavily on the Michigan case, it is virtually certain that a similar result would be reached in Montana.

Therefore, the use of a line item appropriation would be found impermissible as a restriction on the authority of the Board of Regents to supervise, coordinate, manage, and control the University System. The Board of Regents would be required to challenge the condition in court in order to have the condition invalidated.

Sincerely,



Gregory J. Petesch
Director of Legal Services

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